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No. 13

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# Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM H. BLACK and RUTH F. BLACK,

*Petitioners,*

*v.*

A. M. AMEN; H. C. WADLEIGH; ELEEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN, WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES and LARRY STITES, infants under the age of twenty-one years, by LOIS L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH, CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation,

*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR PETITIONERS

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AUGUST, 1957

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*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR PETITIONERS

### OPINIONS BELOW

The District Court's findings of fact, conclusions of law, and judgment (R. 118) are not reported. The opinion of the Court of Appeals for the Tenth Circuit entered November 25, 1955 (R. 409, dissenting opinion

at R. 436), and withdrawn May 4, 1956 (R. 439), is not reported. The new opinion of the Court of Appeals (R. 441, dissenting opinion at R. 460) is reported at 234 F. 2d 12.

## JURISDICTION

On May 4, 1956, the Court of Appeals vacated its judgment of November 25, 1955 (R. 439) and entered a new judgment (R. 474). A petition for rehearing, filed May 24, 1956, was denied June 19, 1956 (R. 474). The petition for a writ of certiorari was filed on August 23, 1956, and, limited to the question set forth below, was granted on November 5, 1956.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

The question presented is whether a number of persons asserting separate and distinct demands as to which there were some common questions of law and fact, may intervene in a proceeding in a federal court, regardless of the citizenship of each intervenor or other jurisdictional requirements, as the Court of Appeals held they might do, merely because the original plaintiff in this so-called spurious class action possessed the requisite jurisdictional requirements, including diversity of citizenship.

## CONSTITUTIONAL PROVISION, STATUTE AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Article III, Section 2 of the Constitution provides in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, . . . between Citizens of different States; . . . ."

The United States Code (62 Stat. 930, 28 U.S.C. § 1332) provides in pertinent part:

"§ 1332. Diversity of citizenship; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States:"

Rule 23(a) of the Federal Rules of Civil Procedure provides:

"Rule 23. *Class Actions.*

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Rule 82 of the Federal Rules of Civil Procedure provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

## STATEMENT

The jurisdictional issue presented for this Court's determination arises in connection with three actions consolidated below for trial and appeal. All alleged in essence that the petitioner,[1] Black, was engaged in a conspiracy to defraud stockholders of Black-Marshall Oil Company. The three actions, all based on diversity of citizenship, were (1) an action brought in the Federal District Court in Kansas by a former stockholder on behalf of all Black-Marshall stockholders; (2) a comparable action brought in the Kansas state court by the same former stockholder and five other former stockholders and later removed to the Federal District Court; and (3) an action brought in the Federal Dis-

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[1] Throughout this brief "petitioner" refers to William H. Black, who is the only petitioner whose actions are presently involved in the case, and is the only petitioner against whom the court below said respondents would be entitled to judgment (R. 460).

Petitioner prevailed below as to one appellant, McBride, on the individual causes advanced (R. 453) and as to the co-receivers on all corporate causes (R. 455). McBride and the co-receivers are listed as respondents solely because the judgment of the Court of Appeals (R. 474) reverses the trial court without setting forth separately the portions of the litigation in which petitioner prevailed. Therefore, in this brief "respondents" refers to the individuals who prevailed in the court below.

By order of April 22, 1957, this Court entered an order granting the motion to substitute Hays Hall as executor of the will of Edith Hall in the place and stead of Edith Hall, one of the respondents.

trict Court in Kansas by co-receivers for Black-Marshall.

Two distinct types of causes of action were involved in these cases—the first asserted individual wrongs to named persons, and the second alleged corporate wrongs to Black-Marshall Oil Company.

The fraud alleged by the individual plaintiffs, former stockholders of the Oil Company, was that in 1944 and 1945 Black and a co-conspirator, Ives, through fraudulent representations, induced the shareholders to sell their Black-Marshall stock to Black at $10 and $12 a share while at the same time having an assured resale at a higher price, and that he did, indeed, sell the stock later at this higher price to National Cooperative Refinery Association. The second claim of fraud, asserted on behalf of the company both by the individual plaintiffs and by the co-receivers, charged Black with having had issued to himself some 32,000 shares of the company's stock for no consideration, which he also sold to the Refinery Association.

Amen, the original single plaintiff in the Federal District Court for Kansas, was a citizen of South Dakota and so alleged. He was thus in a position to establish diversity of citizenship with Black-Marshall Oil Company, an Illinois corporation (the defendant which led the list both in the caption and the body of the complaint and was apparently regarded as a necessary party), with defendants Black and Ives, citizens of California and Illinois respectively, and with National Cooperative Refinery Association, a citizen of Kansas, apparently also considered an important party since Amen alleged that his shares were fraudulently

purchased with "monies furnished by the Association for such purposes, and with the full knowledge and assistance of the Association" (R. 4). So Amen, out of a host of stockholders who became intervenors—most, if not all of whom, were citizens of the same state as one or more of the defendants—brought the suit, although he had had no dealings with Black, Ives, or the Oil Company. His stock was purchased through a man named Danford, apparently an Illinoisan, who, like other plaintiffs, later intervened without stating his citizenship (R. 21, 453).[2]

With a foothold established by a single plaintiff in the federal court, an action was also brought in the state court in Kansas. Here Amen was joined as plaintiff by five citizens of Illinois, of which the defendant Oil Company was a citizen. Upon petition of certain defendants, including Black but also including residents and citizens of Kansas (R. 38-39), this action was removed on July 15, 1949 to the federal court, a palpable error, since citizens of Kansas had been properly joined as defendants and served.[3]

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[2] Actually, Amen had no standing to sue on the corporate cause involving the issuance of the 32,000 shares to Black. Amen purchased his shares in July 1941 after the shares complained of were issued to Black and thus did not meet the requirement of Federal Rule of Civil Procedure 23(b) that the plaintiff be "a shareholder at the time of the transaction of which he complains." Henis v. Compania Agricola de Guatemala, 210 F. 2d 950 (3rd Cir. 1954); Weinhaus v. Gale, 237 F. 2d 197, 199 (7th Cir. 1956).

[3] ". . . Any other action [*i.e.*, not founded on the laws of the United States] shall be removed only if none of the parties in interest joined and served as defendants is a citizen of such state in which such action is brought." 28 U.S.C. § 1441(b).

The removal was also in error in that the proceeding involved both parties defendant and plaintiff who were Illinois citizens.

Amen also moved in the Federal District Court for the Southern District of Illinois to set aside the dissolution of the Oil Company, effected under Illinois law on June 30, 1947 (R. 379). The Illinois District Court set aside the dissolution and appointed D. Arthur Walker of Kansas and Fred E. Windish of Illinois as co-receivers for Black-Marshall, who then instituted a proceeding in the Federal District Court in Kansas against the same defendants on behalf of the corporation (R. 370).

On July 25, 1950, with both actions now in the Federal District Court in Kansas and co-receivers (whose own complaint made a third suit) appointed, many of the other respondents, without alleging any jurisdictional qualifications, petitioned to intervene in both cases. Motions were also made for leave to file amended complaints and apparently to dismiss all defendants except Black, the Oil Company, and Landowners Oil Association.[4] On September 22, 1950, the co-receivers also moved for leave to intervene as parties-plaintiff in the original federal court case and to dismiss the Oil Company as a defendant.

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Five of the plaintiffs were Illinois citizens, defendant Black-Marshall was an Illinois corporation and defendants Ives and Sherrard were also Illinois citizens. In this regard, the petition for removal had stated that the defendants who were Illinois citizens had not been served and that there was therefore diversity of citizenship between plaintiffs and defendants upon whom service had been obtained (R. 38-39). This failure to serve the non-diverse defendants, however, could not justify removal. See Pullman Co. v. Jenkins, 305 U.S. 534, 541.

[4] Landowners Oil Association is a Delaware corporation which, at the time of the organization of Black-Marshall Oil Company, exchanged shares of its capital stock for Black-Marshall shares (R. 123).

On September 25, 1950, the District Court, without apparent consideration of jurisdictional requirements, entered a series of orders which (as best as can be determined from the entire record certified to this Court) granted all the applications for intervention, granted the applications to file amended complaints, and the motions to dismiss various defendants, apparently including the motion of the co-receivers to dismiss the Oil Company.

The simple fact is that at no point was attention paid to the citizenship of the intervenors, the presence of parties necessary for the relief sought, or the alignment of parties.

It was in this posture that the receivers' case was brought to trial and, during the trial, the two actions by the former stockholders consolidated with it (R. 153-156). Plaintiffs were allowed to present both the individual and corporate causes of action, although none of the more than 30 plaintiffs—with the single exception of Amen—had satisfied the jurisdictional requisites for being in the federal court. None of the intervenors alleged their citizenship, and only a few their residence (R. 21, 30, 31, 48, 53, 54). They made no request for findings of fact regarding their citizenship and the trial court made none (R. 96, 118-119).[5]

After a month-long trial, without a jury, Judge Hill dismissed all three actions and entered judgment for the defendants. The court's findings, fully documented to the record, were that the evidence did not establish

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[5] The only finding requested by plaintiffs with respect to citizenship was that the original plaintiff, Amen, was a resident and citizen of South Dakota (R. 96).

any conspiracy by Black with anyone, or any fraudulent misrepresentations by Black, or that Ives who did make them was Black's agent. On the contrary, the court found that plaintiffs received full value for their shares, and that their subsequent increase in value resulted from a successful drilling program and increase in the price of oil. Finally, it found that the shares received by Black from the corporation, including the 32,000 shares under attack, were consideration for transfer to the company of his interest in valuable oil leases.

On appeal the judgment was reversed in an opinion filed May 4, 1956 (replacing one by the same court filed on November 25, 1955). The jurisdictional question was brushed aside with the statement that the court's jurisdiction was not impaired by the interventions, irrespective of the citizenship or amount claimed (R. 442). A majority of the court went on to hold, notwithstanding the trial judge's findings and conclusions, that Black concocted a scheme to defraud, knew of Ives' misrepresentations, and was a constructive trustee holding the proceeds of the 1947 sale of his own stock in trust for the former shareholders.[6]

With respect to the corporate causes, the majority held that such claims must fail for lack of standing to maintain the suit (R. 455). Nonetheless, the majority, again in the face of the findings of the District Court, held ("on a theory which," according to Chief

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[6] Chief Judge Phillips concurred in that part of the decision holding petitioner liable to the individual respondents solely on the ground that Ives was petitioner's agent and petitioner was therefore legally responsible for Ives' misrepresentations (R. 464).

Judge Phillips, "has neither basis in law nor justification in equity" (R. 465)) that the 32,000 shares were fraudulently issued to Black and that despite the failure of the corporate claims, the former stockholders were entitled to redress against Black for the wrong which it held had been done to the corporation.

## SUMMARY OF ARGUMENT

### I

This litigation involves a number of separate and distinct claims, advanced by over 30 intervening plaintiffs, in which the sole basis for federal jurisdiction is diversity of citizenship. The Court of Appeals held that since common questions of law or fact were involved and common relief sought, the federal district court had jurisdiction under Federal Rule of Civil Procedure 23(a)(3) to decide all of these claims, irrespective of the citizenship of the intervenors or the amount claimed, simply because the one plaintiff who originally brought suit had satisfied federal jurisdictional requirements.

The plain result was to bring for decision into the federal courts a sizeable number of distinct, individual claims without regard to jurisdictional standards required under the Constitution and the acts of Congress. As early as *Strawbridge* v. *Curtiss*, 3 Cranch 267, it was authoritatively declared that in diversity cases involving multiple parties complete diversity of citizenship must exist between all parties, with each individually meeting federal jurisdictional requirements. The Court of Appeals, in dispensing with jurisdictional

requirements for intervenors, has swept aside the established law of a century and a half.

No basis can be shown for invoking Rule 23(a)(3) to contravene the established jurisdictional limitations on the federal courts. Rule 23(a)(3) provides a permissive joinder device useful in cases where a number of individuals have separate claims or interests which might involve common questions of law or fact. Suits under this Rule accordingly differ from class actions under Rule 23(a)(1), which involve a common or joint right or interest, and Rule 23(a)(2), which concern interests in a definite property within the jurisdiction of the court. Because Rule 23(a)(3) is nothing more than a means of permissive joinder, parties relying on it must still satisfy federal jurisdictional requirements applicable to the usual diversity suit in which many parties are joined. This was stated most clearly by the late Judge Jerome Frank, writing for himself and Judges Learned and Augustus Hand, in *Steele* v. *Guaranty Trust Co. of New York,* 164 F.2d 387, 388 (2nd Cir. 1947): "[A] proceeding under 23(a)(3) is, in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements."

The jurisdictional requirements in suits under Rule 23(a)(3) are thus identical to those for the usual suits involving the joinder of many parties. These requirements were fully considered in *Clark* v. *Paul Gray, Inc.,* 306 U.S. 583, which confirmed that each claimant must individually establish the basis for federal jurisdiction.

The Court of Appeals' disregard of jurisdictional

requirements stems from an interpretation of Rule 23(a)(3) advanced by Professor James Wm. Moore in his treatise on Federal Practice. Professor Moore himself recognizes that his view dispenses with accepted jurisdictional requirements for intervenors; this he would justify on the ground of supposed procedural utility. The vulnerability of Professor Moore's position has been recognized and, indeed, has been labelled as a use of Rule 23(a)(3) to accomplish a bald enlargement of federal jurisdiction.

As this Court has emphatically stated, problems of jurisdiction in a federal system cannot and should not be resolved in terms of procedural convenience or inconvenience. Diversity jurisdiction must be scrupulously confined, in recognition of the interests and responsibilities of the state courts and to avoid unnecessary burden and strain upon the federal judiciary. Claimed procedural utility cannot replace constitutional and statutory requirements.

Far from being justifiable as convenient or desirable, disregard of federal jurisdictional requirements is, in fact, a likely source of confusion and mischief. This is readily apparent from the present case, where failure to follow jurisdictional rules has resulted in procedural disorder and substantive error. Moreover, in litigation based on diversity of citizenship, where federal courts are obliged to determine and apply state law, disregard of jurisdictional requirements operates to deprive federal courts of authoritative determinations of state law by state tribunals. If parties who should be litigating in state courts are allowed to enter the federal courts improperly, state tribunals are denied

the opportunity to determine state law questions involved. Consequently, the likelihood arises that the federal courts will either misinterpret or overlook controlling state law. The present case graphically illustrates these dangers, for the Court of Appeals indulged in both types of error.

II

The failure of the lower courts to apply jurisdictional requirements has confused these proceedings from their inception. It is not surprising that this litigation is a procedural muddle which can be clarified only by a complete review of the proceedings below. Under the limited grant of certiorari, we do not ask this Court to undertake the necessary review. This could best be done by the trial court upon remand. *Cf. Rayonier, Inc.* v. *United States,* 352 U.S. 350.

## ARGUMENT

### I

### EACH CLAIMANT, IN ORDER TO BE ENTITLED TO INTERVENE IN THE ACTIONS IN THE FEDERAL COURT, MUST SHOW THE PREREQUISITE FOR FEDERAL JURISDICTION, DIVERSITY OF CITIZENSHIP.

#### A. *IN HOLDING THAT RESPONDENTS COULD INTERVENE "IRRESPECTIVE OF CITIZENSHIP OR AMOUNT CLAIMED," THE COURT BELOW IGNORED SETTLED JURISDICTIONAL REQUIREMENTS AND IMPROPERLY ATTEMPTED TO EXTEND FEDERAL JURISDICTION.*

The citizenship of the parties, plaintiffs and intervenors, is in considerable confusion, probably because, under the law as conceived below, it was not regarded as important. But two intervenors as plaintiffs clearly

appear to be citizens of California, as is the petitioner, defendant below. And Black-Marshall, which should be a necessary party in any event, assuming a derivative recovery as allowed by the Court of Appeals, is an Illinois corporation, and so has common citizenship with many of the respondents. The result of this neglect of jurisdictional requirements was to brush aside one of the oldest and most settled doctrines in the entire field of federal jurisdiction: that in diversity cases involving multiple parties "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued in the federal courts." Chief Justice Marshall in *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1807).[7]

Sixty-odd years later, in reaffirming the *Strawbridge* case, Mr. Justice Field again emphasized that each party must meet federal jurisdictional requirements:

> ". . . the designation is intended to embrace all the persons who are on one side, however numerous, so that each distinct interest must be represented by persons, all of whom are entitled to sue, or are liable to be sued in the Federal courts. In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several

[7] In the Strawbridge case the Court was construing the Judiciary Act of 1789, 1 Stat. 73, 78, which was formulated in the singular and referred to controversies "between a citizen of the State . . . and a citizen of another State." The constitutional provision covering diversity jurisdiction (Art. III, §2) and the current act (62 Stat. 930, 28 U.S.C., §1332) are cast in the plural. The difference in language does not affect the settled rule of Strawbridge v. Curtiss. See, e.g., Indianapolis v. Chase National Bank, 314 U.S. 63, 69; Smith v. Sperling, 354 U.S. 91, 93.

co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained." (*Coal Co.* v. *Blatchford*, 11 Wall. 172, 174-175 (1870)).

This rule has been the law for a century and a half.

In the present proceeding the only basis for federal jurisdiction is also diversity of citizenship. Yet the Court of Appeals, by holding that additional plaintiffs could intervene "irrespective of citizenship or amount claimed" because the original plaintiff had the requisite diversity, has swept aside the fundamental rule of law so long maintained by this Court. The entire opinion by the court on the jurisdictional issue consists of the following passage:

> "The original complaint [*i.e.*, the complaint by Amen alone] alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent interventions, irrespective of citizenship or amount claimed. *Shipley* v. *Pittsburgh & Lake Erie Ry. Co.*, [70] F. Supp. 870; *Dickinson* v. *Burnham*, 2 Cir., 197 F.2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners

in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted. See Vol. 3, Moore's Federal Practice p. 3448." (R. 442).[8]

This view of the Court of Appeals, which simply dispenses with jurisdictional requirements for all intervenors, contravenes the established jurisdictional limitations on the United States courts.[9] Under the Constitution and the acts of Congress, jurisdiction of the federal courts is limited to cases arising under the Constitution, laws and treaties of the United States and, where these are not involved—as they are not here—to cases between citizens of different states. The Rules of Civil Procedure, which contain an ex-

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[8] In the trial court petitioner contested the right to bring these actions as spurious class suits under Rule 23(a)(3). Although it was pointed out that the petitions of intervention did not contain any jurisdictional allegations, the argument was directed to the fact that the actions, at best, alleged individual frauds committed by the same person in a different manner and at different times. In the Court of Appeals, petitioner renewed this argument and emphasized that the litigation did not present the type of situation falling within Rule 23(a)(3), and therefore each respondent's case "must stand on its own feet, with proper jurisdictional requirements timely alleged and thereafter proved."

[9] The opinion strongly indicates that the Court of Appeals initially fell into error by viewing the issue as whether or not jurisdiction over the *original* parties was *lost* by the addition of other *dispensable* plaintiffs lacking jurisdictional requirements, instead of considering whether or not jurisdiction over the additional plaintiffs was *gained* because they had a "common question of law or fact" with the original plaintiffs. This error is a common one, but an error nevertheless, as Professor Moore demonstrates at some length. See 4 Moore's Federal Practice 137-142 (2d ed. 1950).

plicit declaration (Rule 82) that they should not be construed to extend or limit jurisdiction, were not designed as an attempt to set aside the limitations upon federal jurisdiction which have been firmly established for 150 years. On the contrary, Rule 23(a)(3) was designed to deal with a familiar situation—one where a number of individuals had separate claims which might involve common questions of fact or law, or both. Here it was desirable, *where it was possible within jurisdictional limitations,* to try the cases together. The late Judge Jerome Frank summed up the matter with unusual succinctness. "[A] proceeding under 23(a)(3)," he wrote for himself and Judges Learned and Augustus Hand, "is, in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements." *Steele* v. *Guaranty Trust Co. of New York*, 164 F.2d 387, 388 (2d Cir. 1947).

Another distinguished appellate judge, Judge Prettyman of the Court of Appeals for the District of Columbia Circuit, has explained why under Rule 23(a)(3) each individual claimant must establish the jurisdictional requisites as to his own claim. In the case before the court the question arose whether the statutory requirement that the claim must equal or exceed $3,000 had been met. Judge Prettyman said:

> "This type of action is spoken of as a 'spurious class action'. The members' interests may be several and not interdependent, although the remaining requisites of the true class action must be met. Their joinder is a matter of economy and efficiency on the part of courts and parties—an

avoidance of a multiplicity of suits. Courts have possessed the power to afford and have afforded this remedy long before the adoption of the new Federal Rules of Civil Procedure. The joinder was and is a matter of discretion in the trial court. However, both at the earlier date and now, when the interests are separate but a joinder is permitted, each individual claim must equal or exceed $3,000 before the action can be prosecuted in a federal court. When the claims are separate, they cannot be aggregated to surpass this jurisdictional threshold." *Knowles* v. *War Damage Corp.*, 171 F.2d 15, 18 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 914.

Even Professor James Wm. Moore, who as we shall see is the architect of respondents' case, points out that under Rule 23(a)(3):

> "There is no jural relationship between the members of the class. . . . The right or liability of each is distinct. The class is formed solely by the presence of a common question of law or fact. When a suit is brought by or against such a class, it is merely an invitation to joinder—an invitation to become a fellow traveller in the litigation, which may or may not be accepted." 3 Moore's *Federal Practice* at p. 3443 (2d ed. 1948).

In short, a proceeding under the rule is, as Judge Frank put it, "but a congeries of separate suits." [10]

[10] The essential nature of a spurious class action as a group of separate suits, which may be joined as a matter of convenience if the rules of the jurisdiction so provide, is well illustrated by the

So being nothing more than a permissive joinder device, the jurisdictional requirements for such an action are comparable to those of the usual suits in which many parties are joined. These requirements were fully considered by this Court in *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, which confirmed that each claimant must individually establish the basis for federal jurisdiction. In the *Clark* case, the fact that one of the many plaintiffs suing to enjoin collection of the

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fact that in the Kansas state courts respondents' actions would have been subject to dismissal for misjoinder of distinct causes of action under G.S. 1949 Kansas 60-601. This statute provides that several causes of action may be united in the same petition, "but the causes of action so united must affect all the parties to the action." Pursuant to this provision and its predecessors, the Kansas courts have uniformly sustained motions to dismiss for misjoinder of causes of action in situations where the claimants could have brought a spurious class suit under the Federal Rules. Holland Oil & Gas Co. v. Holland, 114 Kan. 863, 220 Pac. 1044 (1923); Gallaway v. Purcell, 174 Kan. 659, 258 P.2d 349 (1953); Crisler v. C. K. Packing Co., 181 Kan. 118, 309 P.2d 703 (1957). In the very recent Crisler case, the Kansas Supreme Court, in dismissing the action for misjoinder, held:

> ". . . the contract in question vested separate causes of action in each employee working under the contract. There being separate causes of action, it follows that they cannot be joined in one action because no one party will be affected by the recovery of any other party . . . .
>
> * * * * *
>
> ". . . the parties by pleading identical causes of action all have an interest in the subject of the action, but they do not have an interest in all the relief to be obtained.
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> * * * * *
>
> ". . . in the cases where this court has allowed joinder, the reason was because each cause of action represented an interest in a whole sum to be recovered and not a separate sum to separate parties, as sought in this case." (181 Kan. at 119-120, 309 P. 2d at 704).

fees exacted by the California Caravan Act met the jurisdictional requirements was of no comfort to other plaintiffs. Without dissent, this Court announced:

> "It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy jurisdictional requirements.
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> * * * * *
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> "Proper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved." (306 U.S. at 583-84).

This practice was followed in the case in the Second Circuit which we have already cited, *Steele* v. *Guaranty Trust Co. of New York,* 164 F.2d 387, where it was held that each claimant in an action under Rule 23 (a)(3) must individually satisfy jurisdictional requirements. In the *Steele* case the court had on a prior appeal expressly invited similarly situated plaintiffs to intervene on remand. On the second appeal, it examined the jurisdictional standing of each plaintiff. Some plaintiffs met the diversity requirements, but lacked the requisite jurisdictional amount. One plaintiff met the jurisdictional amount requirement, but lacked diversity. Only the original plaintiff met all

jurisdictional requirements. Each plaintiff was judged on his own jurisdictional standing; only the original plaintiff survived.

B. *CLAIMED PROCEDURAL UTILITY IS NO BASIS FOR DISREGARDING JURISDICTIONAL LIMITATIONS IN DIVERSITY CASES WHICH, AS THIS COURT AND CONGRESS HAVE RECOGNIZED, MUST BE SCRUPULOUSLY OBSERVED.*

The decision below allowing respondents to intervene without regard to diversity rests on a theory advanced by Professor Moore a year before *Clark* v. *Paul Gray, Inc.* was decided (2 Moore, *Federal Practice* 2241-42 (1st ed. 1938)), and resubmitted by him without any attempt to distinguish the effect of that opinion (3 Moore, *Federal Practice* 3443-44 (2d ed. 1948)).

The sole authority cited by Professor Moore in his first edition (2 Moore, *Federal Practice* 2241-42 and n.24) was *Stewart* v. *Dunham*, 115 U.S. 61, a creditor's bill to set aside a fraudulent conveyance. The reasoning in the *Stewart* opinion negatives the extension of the case to a case like the present one.

> "The right of the court to proceed to decree between the appellants and the new parties did not depend upon the difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be an-

> cillary to the jurisdiction acquired between the original parties, and *it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree.* If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing." (115 U.S. at 64). (Emphasis supplied).

As the *Stewart* decision clearly shows, it was an action of the type now explicitly covered by Rule 23 (a)(2), *i.e.*, one in which "the object of the action is the adjudication of claims which do or may affect specific property involved in the action." In this type of action, as emphasized in *Stewart* v. *Dunham*, all members of the class having claims, regardless of their citizenship, are entitled to the benefit of the decree adjudicating rights in the fund or other property under the court's control. Similarly, in class actions in which the right sought to be enforced is "joint or common"—the so-called true class action coming within Rule 23(a)(1)—a decree is binding on all members of the class. See *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356.

In actions under Rule 23(a)(3), however, as Moore himself recognizes (3 Moore, *Federal Practice* 3426, 3456, 3465 (2d ed. 1948)), other members of the class are not entitled to the benefit of the decree; the decision is *res judicata* only as to the original parties and those who have actually intervened. *E.g.*, *Martinez* v.

*Maverick County*, 219 F.2d 666, 672 (5th Cir. 1955); *Kainz* v. *Anheuser-Busch*, 194 F.2d 737, 742, 745 (7th Cir. 1952), *cert. denied*, 344 U.S. 820; *California Apparel Creators* v. *Wieder of Calif.*, 162 F.2d 893, 897 (2d Cir. 1947), *cert. denied*, 332 U.S. 816. This distinction between actions under Rule 23(a)(1) and (2) and those under subsection (3) is crucial.[11]

The action under Rule 23(a)(3) differs sharply from the actions under subsections (1) and (2) which are based, respectively, on a joint right and an interest in a definite property within the jurisdiction of the court. In the latter actions the central common interest makes an adjudication binding on all. If the class action were not available in these situations, a claimant would be compelled to join in the action or completely forego his right of recovery. Under subsection (3), however, there is no "common or joint interest", as in *Supreme Tribe of Ben Hur* v. *Cauble*, or fund in the jurisdiction of the court, as in *Stewart* v. *Dunham*. Such an action presents only a series of

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[11] In addition to the fact that the federal courts themselves have consistently recognized that a spurious class action is *res judicata* only as to plaintiffs who are in fact parties to the action, it should be noted that the Kansas law would require the same result. Under Kansas law, the state in which the federal district court sat, a judgment in favor of any member of the so-called spurious class who was not in fact a party to the suit would have been void, incapable of ratification and subject to be set aside on motion at any time. Taylor v. Focks Drilling & Mfg. Corp., 144 Kan. 626; 62 P.2d 903 (1936). The federal court in Kansas would be required, under the doctrine of Erie Railroad Co. v. Tompkins, to reach the same result as to any member of the spurious class who did not intervene. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541; Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530; Angel v. Bullington, 330 U.S. 183.

separate and distinct claims related solely in the sense that there is a common question of law or fact involved and common relief is sought. The claims of absent parties, being separate and distinct, are not involved and a decree is not binding on them. Denial of intervention because of failure to satisfy jurisdictional requirements does not preclude a claimant from his day in court. Its sole effect is to compel a person to bring his action in the proper tribunal.

In contrast to Professor Moore's reliance on *Stewart* v. *Dunham* is this Court's action, in the *Clark* v. *Paul Gray* opinion, of expressly distinguishing the line of cases involving a fund within the jurisdiction of the court:

> "A different question is involved in the case of a creditor's bill to liquidate an insolvent corporation for the benefit of all creditors. There his claim must exceed the jurisdictional amount . . . . But creditors whose claims are less may be made parties because of their interest in a fund brought within the jurisdiction of the court." (306 U.S. at 590, n.2).

Nor is *Clark* v. *Paul Gray* the only occasion when this Court pointed out that the *Stewart* v. *Dunham* rule did not apply to situations where there is no fund within the court's jurisdiction:

> "The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has

direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." *Fulton Nat'l Bank* v. *Hozier*, 267 U.S. 276, 280.

Significant also in the *Clark* v. *Paul Gray* case is the refusal to permit the possibility, however remote,[12] of an appellate court being "called on to sustain a decree in favor of a plaintiff who had not shown that his claim involved the jurisdictional amount [or that he possessed the requisite diversity], even though the suit were dismissed on the merits as to the other plaintiffs who had established the jurisdictional amount [and diversity] for themselves." (306 U.S. at 590). This, of course, is the very danger raised by respondents' construction of Rule 23(a)(3). The rule does not require that *all* questions of law and fact be common; indeed, only *one* need be. A defendant may possess certain defenses against some plaintiffs and different defenses or none at all against others. Under the view taken by the court below, at the conclusion of the trial, the court might well find itself in precisely the unhappy predicament which this Court anticipated in the *Clark* case.

In his second edition Professor Moore abandoned reliance on the *Stewart* case, citing instead the holding in *Shipley* v. *Pittsburgh & L.E.R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947). The "bootstraps" nature of this endeavor has not escaped attention. As Professors Hart and Wechsler have observed in their work, *"The Federal Courts and the Federal System"* (1953):

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[12] The Clark opinion conceded "it appears that such a result could not follow here." 306 U.S. at 590.

> "Professor Moore's principal authority for the view that independent jurisdictional grounds are not needed to support permissive intervention in a 'spurious' class action is the Shipley case, *supra*. The only authority cited in the Shipley case was Professor Moore . . . .
>
> "Is the Supreme Court likely to uphold this use of Rule 23(a)(3) to accomplish so bald an enlargement of federal jurisdiction?" (p. 937).

The baldness of the enlargement of federal jurisdiction is underscored by Professor Moore himself in his discussion of Rule 24(b),[13] upon which rests the court's authority to permit intervention, whether the intervenors are many and hence may proceed under Rule 23(a)(3), or are only one or two.

> ". . . where intervention is sought to present a claim or defense in an *in personam* action and the only basis therefor is a common question of law or fact, there is no reason to permit the intervener's rights to be litigated if they could not have been, had the intervener been joined as an original plaintiff or defendant. Procedurally it may be very desirable to permit the intervention, but it would constitute an undue expansion of federal jurisdiction to dispense with independent jurisdictional requirements . . . . Procedurally it may be wise for a court to allow intervention and

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[13] "24(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . ."

> Rule 24(b) does authorize the court to permit intervention where there is a common question of law or fact. But Rule 24(b) is subject to federal jurisdictional limitations, and if intervention were permitted in this case . . . [the intervener] would be permitted to do indirectly what the jurisdictional rules preclude him from doing directly . . . .
>
> "What has just been said about intervention in an *in personam* action is subject to this qualification: no independent jurisdictional ground is needed to support intervention in a class action, even though the only basis for such action is the presence of a common question of law or fact affecting the several rights involved. . . . The reason why intervention in the class action, although such action involves only a common question of law or fact, need not be supported by independent grounds is that *because of the numerous persons involved, the utilization of the representative concept is warranted.* But *in the first* . . . *case* put above where numerous persons are not involved and hence a class action is not warranted by Rule 23(a)(3), *there is no real reason to dispense with the jurisdictional requirements* which . . . [the intervener] would have to satisfy as an original plaintiff." 4 Moore, *Federal Practice* 136-37 (2d ed. 1950). (Emphasis supplied).

Permissive intervention in all actions is governed by the same Rule 24(b), permitting intervention "when an applicant's claim or defense and the main action

have a question of law or fact in common." Why intervention under Rule 24(b) is subject to federal jurisdictional limitations when it is sought in the general run of actions but is free of such restraint when sought in a Rule 23(a)(3) action is not satisfactorily explained. Nor can it be. Why "it would constitute an undue expansion of federal jurisdiction to dispense with independent jurisdictional requirements" in the former actions but not in the latter is not satisfactorily explained. Nor can it be. Moore's contention appears to be simply that when supposed procedural utility [14] is great enough—as he considers it under Rule 23(a)(3)—federal jurisdiction may be expanded; when

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[14] The true considerations which bear upon procedural utility in connection with intervention are far broader than Professor Moore has recognized:

> "Permissive intervention is largely a matter of trial convenience. It is designed primarily to allow litigants in the federal courts to clear up in a single suit, questions which would ordinarily arise in separate *federal* suits. But there seems to be no reason why disputes which, if originally brought, would have been confined to a state forum should be dragged into the national courts. The purpose of the Rule is to facilitate *federal* practice and not to reduce state litigation as well. The protective function of the court is not called into play since the intervener in permissive intervention will not be prejudiced or bound by the original proceeding. The original suit does not create the subsequent litigation or catch the third person in the cross fire of the main litigants. While it would be convenient to clear up these questions in a single suit, as long as the national courts are courts of limited jurisdiction it does not seem reasonable to throw additional burdens on already crowded dockets merely because controversies normally without their jurisdiction are similar or identical in some questions of law or fact to a case properly before them." Campbell, *Jurisdiction and Venue Aspects of Intervention Under Federal Rule 24*, 7 U. of Pitt. L. Rev. 1, 10-11 (1940). (Emphasis in original).

procedural utility is not very substantial—as in the ordinary situation—federal jurisdiction must remain within its constitutional limitations. A recent commentator has said of Moore's contention:

> ". . . a distinction which is based simply on the potential number of lawsuits which may ensue seems untenable in terms of the factors which appear to have governed in determining what proceedings are to be treated as ancillary." [15]

As this Court has emphatically stated, in a federal system jurisdictional problems cannot and should not be resolved in terms of procedural convenience or inconvenience. Congress and this Court have consistently recognized the limits on the diversity jurisdiction of the federal courts imposed by the Federal Constitution (Article III, § 2, Cl. 1):

> "The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business . . . . 'The policy of the statute [conferring diversity jurisdiction upon the district courts] calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of con-

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[15] *The Ancillary Concept and the Federal Rules*, 64 Harv. L. Rev. 968, 975 (1951).

> troversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' *Healy* v. *Ratta,* supra, at 270. In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy." *Indianapolis* v. *Chase National Bank,* 314 U.S. 63, 76-77.

The wisdom of scrupulously confining federal diversity jurisdiction—both in recognition of the interests and responsibilities of the state courts and in seeking to avoid unnecessary burden and strain upon the federal courts—is hardly subject to dispute. Indeed, these factors are so compelling they have resulted in various efforts to narrow diversity jurisdiction or to eliminate it completely.[16]

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[16] See, e.g., H.R. 2516 and H.R. 4497 introduced in the current Congress (providing for an increase to $10,000 in the amount required for District Court jurisdiction and for limitation or elimination of diversity jurisdiction with respect to corporations) on which Subcommittee No. 3 of the House Committee on the Judiciary held hearings on July 12, 1957; H.R. 3098, 82d Cong., 2d Sess. (providing for an increase in the jurisdictional amount designed to reduce the amount of federal court time consumed in handling private cases, including those based on diversity of citizenship) which was passed by the House of Representatives in 1952 (98 Cong. Rec. 5509); S. 466, 79th Cong., 1st Sess. (bill introduced in 1945 with the approval of the Attorney General and numerous federal judges to abolish diversity jurisdiction except for removal by a nonresident defendant in certain instances); S. Rep. No. 691, 71st

As Mr. Justice Frankfurter stated in his concurring opinion in *Lumbermen's Casualty Co.* v. *Elbert*, 348 U.S. 48, 56-59:

> ". . . What with the increasing permeation of national feeling and the mobility of modern life, little excuse is left for diversity jurisdiction, now that *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, has put a stop to the unwarranted freedom of federal courts to fashion rules of local law in defiance of local law.

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Cong., 2d Sess. (1930); S. Rep. No. 530, 72d Cong., 1st Sess. (1932) (reporting favorably bills providing for complete abolition of diversity jurisdiction).

In supporting the 1945 proposal, Circuit Judge Denman testified:

"So far as concerns the Federal Government this . . . judicial effort in diversity cases is a waste of time. Until 1938 there existed a judge-created body of Federal common law of tort and contract, often differing from the State law. The same was true of a Federal body of equitable rights. These seemed to justify the diversity jurisdiction. In that year this Federal common law was eliminated by the decision of the Supreme Court in *Erie Railway* v. *Tompkins* (304 U.S. 64)."

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"It is obvious gentlemen, that these State courts are very much better equipped than ours to decide cases involving their own law, and it is submitted that there should be restored to the States the right to make such decisions."

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"The most potent argument then made was on behalf of the great corporations having businesses in many States. These claimed that in construing their contracts, and in determining their liability in personal injury suits, their businesses should not be subject to the vicissitudes of the varying State laws. That principal argument of the opponents of such legislation departed with *Erie Railway* v. *Thompkins* [sic]." (Hearings before Senate Judiciary Committee on S. 466, 79th Cong., 1st Sess. (1945), pp. 2, 5, 6).

"A legal device like that of federal diversity jurisdiction which is inherently, as I believe it to be, not founded in reason, offers constant temptation to new abuses."

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". . . My concern is with the bearing of diversity jurisdiction on the effective functioning of the federal judiciary."

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"Diversity cases have long constituted a considerable portion of all civil cases filed in the federal courts. For the last ten years the proportion of diversity cases has greatly increased, so that it is safe to say that diversity cases are now taking at least half of the time that the District Courts are devoting to civil cases. (This is the conclusion of the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts.)"

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". . . the business of courts, particularly of the federal courts, is drastically unlike the business of factories. The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle but far-reaching, which cannot be satisfied by enlarging the judicial plant."[17]

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[17] The Annual Reports of the Director of the Administrative Office of the United States Courts lend strong support to these views. The most recent report reveals that diversity cases commenced or removed to the federal courts during the fiscal

Under the view taken by the Court of Appeals, the federal courts could be burdened with time-consuming mass tort and contract litigation. These cases involve no question of federal import but solely matters of local concern. Nonetheless, if jurisdictional standards are dispensed with, such litigation could be brought entirely into the federal courts.

There is no legal basis for so dispensing with jurisdictional requirements. The only reason advanced for this expansion of federal diversity jurisdiction involved is that it would be convenient. Federal jurisdiction has not been, and cannot be, so conferred.

*C. FAILURE TO REQUIRE INTERVENORS TO MEET JURISDICTIONAL REQUIREMENTS LEADS TO CONFUSION AND SUBSTANTIVE ERROR, AS IT HAS IN THE INSTANT CASE, AND IS PREJUDICIAL TO THE FUNCTIONING OF A SYSTEM OF COORDINATE FEDERAL AND STATE COURTS.*

Failure to require intervenors to satisfy jurisdictional standards, far from being justifiable as convenient or desirable, is, in fact, a likely source of confusion and mischief. The harm that results is well illustrated by the instant case where the failure to follow jurisdictional rules has been reflected in procedural con-

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year ending June 30, 1956, totaled 20,525, accounting for two-thirds of all private cases other than local litigation in the District of Columbia. (Private civil cases dealing with federal questions totaled 7,676, and private civil cases in admiralty came to 2,558.) As the report emphasizes, the number of private civil cases is "significant in relation to the workload of the courts because on the average private civil cases take three times as much time of the judges per case as government cases." See Annual Report of the Director of the Administrative Office of the United States Courts (1956), pp. 62, 214.

fusion and substantive error. From the record, it is hard to determine just when various individuals were permitted to intervene, who was dismissed as party-defendant and when, etc. This is not surprising, considering the failure from the beginning to view federal jurisdictional requirements of any importance.

Moreover, the ability of federal courts to discharge their responsibility in diversity cases is impaired. Allowing parties who should be litigating in state courts to come into federal courts deprives state tribunals of the opportunity to determine the state law questions involved. The federal courts, in turn, are deprived, in adjudicating state law questions brought before them in diversity cases, of authoritative determinations of state law by the state courts. Consequently, the federal court will, as here, either misinterpret or overlook controlling state law.

The majority below indulged in both types of error, which, while not reviewable here under the limited grant of certiorari, illustrate the adverse practical effect of the ruling below. Two examples will suffice.

1. THE FAILURE TO APPLY THE KANSAS LIMITATIONS PERIOD

Here one of the two causes of action was based on the alleged fraudulent issuance at the time of the organization of Black-Marshall Oil Company in 1940, of approximately 32,000 shares of the company's stock to Black without consideration. A total of 122,500 shares of Black-Marshall common stock was issued, all at the time of its incorporation. Of these, 64,870 shares were issued to Black and Deering J. Marshall, Black's original associate in organizing Black-Mar-

shall. Although these shares were issued to Black and Marshall under identical circumstances, it is only Black's half of the block of shares which is challenged in this action as having been fraudulently issued.

Under the Kansas statute of limitations (G.S. 1949 Kansas 60-306) a suit for fraud is barred unless brought within two years after discovery of the fraud.[18] A majority of the Court of Appeals found the statute inapplicable, despite the fact that the evidence of record showed that the plaintiffs had known all the facts relating to the issuance of the stock for at least five years prior to bringing their actions. (The District Court also found [19] that the shares were properly issued for full value received, but this we pass as irrelevant to the present point, which is when did plaintiffs know the facts necessary to discover fraud, if any.)

That plaintiffs were fully apprised of all the facts relating to the issuance of the shares is clear. The evidence shows:

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[18] Under the Kansas decisions, this statute requires that suit be instituted within two years after the discovery of such facts as would on reasonable inquiry and investigation lead to knowledge of the fraud. See Woodworth v. Kendall, 172 Kan. 332, 239 P. 2d 924 (1952); City of Coffeyville v. Metcalf, 134 Kan. 361, 5 P.2d 807 (1931).

[19] The Court found (and Judge Phillips agreed (R. 466-469)) that all 122,500 shares of common stock had been issued in exchange for the five Kansas leases (Finding VI, R. 122-123). It further expressly found that Black and Marshall:

> ". . . were issued 64,870 shares which were carried on the books as Black et al., for the partnership interest of Black and Marshall in the original five Kansas leases." (Finding VI, R.123).

(1) The issuance of the full 122,500 shares, which includes the 32,000 shares here involved, is set forth in the original incorporation minutes (R. 465-466; CR. 1718-1720).[20]

(2) The issuance is also set forth in the minutes of the first meeting of the Board of Directors of Black-Marshall at which the so-called Aledo group, including the respondents, had a majority (R. 467; CR. 1722-1723).

(3) The issuance was also covered in the Black-Marshall stock book (R. 466; CR. 1559-1563).

(4) A recital of the total of 122,500 shares issued for the original five Kansas leases was contained in every annual audit report of the company which was read at the directors' and at the stockholders' meetings (R. 467-468; CR. 1786-1800).

(5) Marshall sold his half of such shares to the corporation at a time when the respondents were well represented by membership on the Black-Marshall Board of Directors and pursuant to a resolution of the stockholders, including respondents (R. 468; CR. 1768-1770, 1795, 1796-1799).

In short, as Chief Judge Phillips emphasized in his dissent:

> " . . . it certainly is beyond the realm of possibility that the Aledo Group, as stockholders, and a portion of them as directors, did not know, at

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[20] References to "CR." are to parts of the Certified Record filed with the Clerk of this Court which were not included in the Transcript of Record printed in this Court.

least more than four years from the time the first of the actions was commenced, all of the facts with respect to the issuance of the 64,870 shares of stock to Black and Marshall." (R. 472.)

If this litigation had been tried in the state court, as it would have been had not all the claimants flocked into the federal court under Amen's jurisdictional passport, the federal court in Amen's case could have had an authoritative ruling by a Kansas state court that the action was barred. It is hard to conceive that it would then have disregarded the state limitations period. Yet, as a result of allowing the indiscriminate intervention in the federal court litigation of plaintiffs who had not satisfied the jurisdictional requirements, the opportunity for an authoritative determination by the Kansas court was eliminated.

2. THE FAILURE TO CONSIDER THE CONTROLLING LAW ON RECOVERY FOR CORPORATE WRONGS

As stated before, the majority of the Court of Appeals held that 32,000 shares were fraudulently issued to petitioner and disposed of the price received for them, not by awarding it to the corporation which it found to have been defrauded but by requiring petitioner to account to the plaintiffs here as some of the former stockholders of the corporation. It would be illuminating to know what state's law the court thought it was applying and how it went about ascertaining that law. But this we shall never know because the majority below did not attempt to determine what state's law

was applicable or the substantive provisions of the applicable law.[21] It is probable that the controlling law here is that of Illinois where the Oil Company was incorporated and where the transaction occurred. But under Illinois law recovery for a fraudulent issuance of shares could be had only on a cause of action derived from the corporation. Its fruits could lawfully accrue only to the corporation. The Court of Appeals itself had recognized in its first opinion that only the corporation had a cause of action for this alleged fraud. It there held that the co-receivers had standing to sue on behalf of the corporation to recover from petitioner the proceeds of the sale of the 32,000 shares. On reconsideration of the case, however, the court believed that this would result in the proceeds of the sale going principally to the National Cooperative Refinery Association as majority stockholder of Black-Marshall. So the Court of Appeals withdrew this first opinion, held that the corporate claims must fail, but evolved the novel rule that Black by allegedly obtaining stock without consideration had committed a wrong for which he must account to some of the former stockholders—the successful respondents.

While the court said that the individual former shareholders could recover for the alleged wrong to the corporation, it is clear that the law of Illinois says

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[21] The Kansas state courts have clearly recognized and diligently discharged their duty to apply the proper substantive law. See, *e. g.*, Columbia Casualty Co. v. Sodini, 159 Kan. 478, 156 P.2d 524 (1945); Pool v. Day, 141 Kan. 195, 40 P.2d 396 (1935); Hamilton v. H. & St. J. Rld. Co., 39 Kan. 56, 18 Pac. 57 (1888).

that they cannot. If Black did not give consideration for his shares, under Illinois law, the wrong results not to the stockholders but to the corporation. A wrong committed against a corporation does not result in any right of action in the stockholders and creates only a right of action in the corporation. Only if the corporation fails to act, may a stockholder bring suit and in such case he acts solely for the corporation in a derivative action and any recovery is for the exclusive benefit of the corporation. See, *e.g., Bingham* v. *Ditzler,* 309 Ill. App. 581, 33 N.E. 2d 939, 946 (1941) (officers and directors charged with converting moneys required to account to corporation, not shareholder praying for an accounting); *Voorhees* v. *Mason,* 245 Ill. 256, 91 N.E. 1056, 1059 (1910) (directors charged with issuing stock to themselves without consideration required to account to the corporation, not to shareholders bringing suit); *Chicago Macaroni Mfg. Co.* v. *Boggiano,* 202 Ill. 312, 67 N.E. 17, 20 (1903) (corporate officer required to repay illegally retained corporate funds to corporation, not to stockholder bringing suit).

Once again, if the action in the state court had continued, that Kansas court would have had an opportunity to determine, as Kansas courts have been alert to do, what law was applicable and what the substantive provisions of that law were. (See Kansas decisions cited, note 21 *supra*).

We have pointed out but two of the instances in which the court below either rejected the applicable law or declined even to determine what law was appli-

cable. Examples could be multiplied from the court's treatment of other substantive law questions were it useful to do so. Enough has been said to make the essential point, that if jurisdictional requirements are disregarded—so that claims clearly belonging in the state courts are improperly allowed into the federal courts—the federal courts are deprived of the precise determinations which under *Erie Railroad Co.* v. *Tompkins* they are obligated to follow.

## II

### This Cause, Which Has Been Characterized From Its Outset by Error Resulting from Failure to Apply Federal Jurisdictional Requirements, Should Be Remanded to the Trial Court for Consideration of Such Jurisdictional Requirements.

Once the conclusion has been reached, as we submit it should, that the intervenors must severally meet federal jurisdictional requirements, the question remains of applying that conclusion to this litigation. The failure of the courts below to consider jurisdictional requirements important and to apply them has confused these proceedings since Amen first saw fit to bring suit in the Federal Court in Kansas. Procedurally, the litigation is best described as a muddle, which can only be clarified by a complete review of the proceedings below.

The grant of certiorari was limited to the determination of the basic jurisdictional question. It is not fitting—indeed, it is hardly possible on this record—and we do not ask this Court to undertake this review of

the proceedings and application of the jurisdictional rules to them. This should be done upon remand.

The initial task, upon remand, must be to establish the citizenship of the parties. Two respondents, Kenneth D. and Hazel Constant, seem clearly to be citizens of California. They do not have the requisite diversity of citizenship with petitioner Black. Beyond this, however, the inquiry becomes more complicated and requires reopening the record for new evidence on the citizenship of the plaintiffs. Most basically, in view of the decision below invalidating petitioner's 32,000 shares of stock, the determination must be made whether Black-Marshall was and is a necessary party-defendant in any such recovery.[22] Black-Marshall, we contend, is a necessary party defendant. Thus, there is no basis for federal jurisdiction based on diversity since an alignment of parties would show citizens of Illinois on both sides of the controversy.

Although unraveling the jurisdictional errors is a formidable task, it is submitted that, once this Court determines the question presented here, the trial court will be best able to do so. *Cf. Rayonier Inc.* v. *United States,* 352 U.S. 315.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed with directions that the

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[22] In a proceeding in which shares of a corporation are cancelled, and where the plaintiffs admitted that the corporation was in antagonistic hands (See Par. 15 of complaint, R. 8, 18), it is clear that the corporation must be aligned as a party defendant. Smith v. Sperling, 354 U.S. 91; Venner v. Great Northern Railway, 209 U.S. 24; Doctor v. Harrington, 196 U.S. 579, 587; Davenport v. Dows, 18 Wall. 626.

cause be remanded to the District Court for re-examination in light of the controlling jurisdictional rules.

Respectfully submitted,

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